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In The

Supreme Court of the United States

October Term, 1974

No. 74-887

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW GROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS AND COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

Petitioners,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS CITY COUNCIL OF CHICAGO AND RICHARD J. DALEY, MAYOR

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
The Background of the Present Litigation	4
The First Trial of this Case	8
Distribution of Blacks and Puerto Ricans Among the Wards of Chicago	9
Testimony of the Opinion Witnesses	10
The Students' Map	11
Evidence Concerning the 7th Ward	14
The First Opinion of the Court of Appeals	15
The Second Trial	17
Plaintiffs' Demonstration Map	18
The Students' Map at the Second Trial	18
The Second Judgment of the District Court	20
The Second Opinion of the Court of Appeals	20

REASONS FOR DENYING THE WRIT 24

I.

No Blacks or Puerto Ricans Have Been "Purposefully Excluded" from their Voting Rights by the Present Chicago Reapportionment Ordinance.

The Composition of the City Council of Chicago, Coupled with the Census Figures, Demonstrates that There Has Been No Invidious Discrimination in this Respect 25

II.

Petitioners Failed to Make out a Prima Case of Invidious Discrimination.

There Was Therefore No Occasion at the Trial to Shift the Burden of Proof 28

III.

The "Strict Scrutiny" Doctrine Is Not Applicable to Legislative Distributing Cases Involving Claims of Racial Gerrymandering 31

IV.

The Issue of the Correctness of the Court of Appeals' Reversal of the Judgment of the District Court as to the 7th Ward Has Been Waived 37

CONCLUSION 38

APPENDIX A: Map of the Wards of the City of Chicago, as Redistricted by the 1970 Ordinance 39

CITATIONS

Cases

Avery v. Midland County, Texas, 390 U.S. 474 (1968) 5, 12
Baker v. Carr, 369 U.S. 186 (1962) 4
Bush v. Martin, 251 F. Supp. 245 (DC, Kan. 1966) 36
Carrington v. Rash, 380 U.S. 89 (1965), *distinguished* .. 25
Chapman v. Meier, ... U.S. ....., 43 L.W. 4199 (1975) .. 34
Cousins v. City Council of Chicago, 322 F. Supp. 428 (ND, Ill. 1971) 2
Cousins v. City Council of Chicago, 466 F.2d 830 (1972), cert. denied, 409 U.S. 893 (1972) 2, 9, 10, 11, 13, 14, 15, 16, 18, 22
Cousins v. City Council of Chicago, 361 F. Supp. 530 (ND, Ill., 1973) 2, 17
Cousins v. City Council of Chicago, 503 F.2d (adv. sh.) 912 (1974) 2, 8, 24, 29, 30, 31
Dunn v. Blumstein, 405 U.S. 330 (1972), *distinguished* .. 34
Gaffney v. Cummings, 412 U.S. 735 (1973) 29, 36, 37
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 25
Jones v. Georgia, 389 U.S. 24 (1967), *distinguished* 35
Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973), *distinguished* 35
Kilgarlin v. Hill, 386 U.S. 120 (1967) 26
Kilgarlin v. Martin, 252 F. Supp. 404 (SD, Tex., 1966) 21, 26, 27
Mann v. Davis, 245 F. Supp. 241 (ED, Va. 1965) 27
Meeks v. Avery, 251 F. Supp. 245 ((DC, Kan., 1966) .. 36
Reynolds v. Sims, 377 U.S. 533 (1964) 27

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 32, 36
Skolnick v. Mayor and City Council of Chicago, 415 F.2d 1291 (7 Cir., 1969), cert. denied, 397 U.S. 954 *(1970)* *6*, 26
Skolnick v. Mayor and City Council of Chicago, 319 F. Supp. 1219 (ND, Ill., 1970) 7, 26
Skolnick v. Mayor and City Council of Chicago, (No. 18878, 7 Cir., 1970) (unreported) 7
Sims v. Baggett, 247 F. Supp. 96 (MD, Ala., 1965) 36
Sincock v. Gately, 262 F. Supp. 739 (DC, Del., 1967) 36
Thornton v. Davis, 382 U.S. 42 (1965) 27
Turner v. Fouche, 396 U.S. 346 (1970), *distinguished* .. 35
WMCA v. Lomenzo, 238 F. Supp. 916 (SD, NY, 1965), aff'd per curiam, 382 U.S. 4 (1965) 36
Wells v. Rockefeller, 311 F. Supp. 48 (SD, NY, 1970), aff'd 398 U.S. 901 (1970) 36
Whitcomb v. Chavis, 403 U.S. 124 (1971) 21, 32, 33
White v. Regester, 412 U.S. 755 (1973) 21, 28, 29
Wright v. Rockefeller, 386 U.S. 52 (1964) 21, 27, 33, 34

Statutes

Illinois Rev. Stat., 1973, ch. 24, pars. 21-36 and 21-38 4

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS CITY COUNCIL OF CHICAGO AND RICHARD J. DALEY, MAYOR

OPINIONS BELOW

In the courts below the first-named plaintiff in this litigation was William Cousins, Jr., an alderman of the City of Chicago and a principal witness at the two trials. The case was then known as *Cousins et al.* v. *City Council of the City of Chicago et al.* However, Alderman Cousins has not joined in this petition for certiorari.

The case was tried twice and twice appealed. The first trial resulted in judgment for the defendants; the opinion of the district court is reported at 322 F. Supp. 428 (N.D., Ill., 1971). In the first appeal the Court of Appeals for the Seventh Circuit concluded with a reversal and remandment for a new trial; this is reported at 466 F. 2d 830 (1972), cert. denied, 409 U.S. 893 (1972).

The second trial ended in judgment for the plaintiffs as to the districting of one ward, the 7th, and for the defendants as to all of the 49 other wards. That judgment is to be found at 361 F. Supp. 530 (N.D., Ill., 1973) and it has been reproduced in Appendix B of the petition for certiorari.

On the second appeal the judgment of the district court, insofar as it was in favor of plaintiffs, was reversed, but affirmed in all other respects. The opinion of the Court of Appeals in the second appeal is published in 503 F. 2d (adv. sh.) 912 (7 Cir., 1974), and it has been reproduced in Appendix A of the petition for certiorari.

A ward map of the City of Chicago, according to the 1970 ordinance, is reproduced in Appendix A at the end of this brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition for certiorari.

STATEMENT OF THE CASE

As Circuit Judge Stevens noted in his concurring opinion (503 F. 2d at 925), in a case of this character, it is important that there be "a careful and objective appraisal of the facts." In consequence, this statement of the case is regretably more detailed and extensive than is ordinarily desirable.

The Background of the Present Litigation

Since 1941 Illinois law has provided by Section 21-36 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 21-36):

> "The City of Chicago shall be divided into 50 wards. In the formation of wards the population of each shall be as nearly equal as practicable and each shall be composed of contiguous and compact territory."

Redistricting every ten years is mandated by Section 21-38 of the same statute, which directs:

> "On or before the first day of December, of the year following the year in which the national census is taken, and every ten years thereafter, the city council shall by ordinance redistrict the city on the basis of the national census of the preceding year."

However, the phrase "as nearly equal as practicable" had, prior to 1970, come to be very liberally construed.

The impact of *Baker* v. *Carr,* 369 U.S. 186 (1962), was first brought home to Chicago through the efforts of a layman filing as a *pro se* plaintiff. On November 22, 1966, he instituted a class action in the district court on behalf of the voters, charging that the wards, as drawn in the

1961 ordinance, on the basis of the 1960 census, violated the one-person, one-vote rule. The district court deferred action in this case until after this Court, in *Avery* v. *Midland County, Texas,* 390 U.S. 474 (1968), had determined that the one-person, one-vote principle is applicable to municipalities. Meanwhile, Chief Judge William J. Campbell of the district court, having found that the *pro se* plaintiff, to whom he gave credit for having initiated the action, was incapable of adequately representing the entire voting population "in such a far reaching lawsuit," appointed the Chicago Bar Association as *amicus curiae* to assure that the interest of the voters would be adequately represented by professional counsel. The bar association designated former Acting Solicitor General Robert L. Stern and two other lawyers, one black, to carry out that assignment, which they did by filing briefs and actively participating at every stage of the case.

After public hearings before two Special Commissioners, one a Republican and one a Democrat, appointed to marshall the evidence, and the filing of their interim report, the district court entered a final order on September 11, 1968, finding that the 1961 ordinance contained impermissible deviations, under the 1960 census, from the one-person, one-vote rule. The judgment forbade the holding of any more general aldermanic elections under the 1961 apportionment ordinance. In addition, Chief Judge Campbell directed the City to file with the court on or before November 1, 1970 (later extended to November 10, 1970), a fully detailed and lawfully enacted redistricting ordinance, based on the forthcoming 1970 census figures and conforming with the requirements of the United States Constitution, which would serve as the basis of the general aldermanic election of 1971.

The court of appeals affirmed the judgment of Judge Campbell on December 18, 1968. *Skolnick* v. *Mayor and City Council of Chicago,* 415 F. 2d 1291 (7 Cir., 1969), *cert. denied,* 397 U.S. 954 (1970).

The 1970 reapportionment ordinance, with which this case is concerned, was thereupon prepared under the supervision and close scrutiny of the district court.

A five-man subcommittee of the City Council was designated by that body's committee on committees and rules to prepare the reapportionment ordinance. The first preliminary census tract figures were filed with the district court and sent to the parties by the U. S. Bureau of the Census in September, 1970.

The redistricting ordinance and map were then drawn at 16 public hearings conducted by the subcommittee between October 13, 1970, and November 5, 1970. The transcript of the hearings ran to 716 pages. The mathematical data on population, on which the redistricting was based, was taken from publications of the U. S. Bureau of the Census, as required both by state statute and federal court order. The transcript shows that the ordinance was drafted in accordance with an unvarying procedure, wherein census tracts and enumeration districts were identified in sequence and official population figures correlated with compact, contiguous territory. A running total was recorded until the figure of 66,582 (1/50th of 3,329,090, the total population of Chicago according to the 1970 census, as tabulated at the time of the enactment of the ordinance) was approximated insofar as possible. The sessions were diligently attended by the present plaintiffs-petitioners.

The completed ordinance and map—which permitted a spread of no more than 9/10ths of one percent between the

most populous and the least populous ward—was reported by the subcommittee to the full City Council, where, after debate, the ordinance was adopted on November 6, 1970, by a vote of 41 to 6.

On November 14, 1970, after a contested hearing, the district court, in an opinion by Judge Campbell, held the 1970 ordinance constitutional. *Skolnick* v. *Mayor and City Council of Chicago,* 319 F. Supp. 1219 (N.D. Ill., 1970).

At this district court hearing some of the present plaintiffs, at the last moment, sought to intervene and to file an amended complaint including a claim that, notwithstanding the close approximation to precise equality of populations presented by the ordinance, nevertheless the ordinance was invalid by reason of alleged racial and ethnic gerrymandering which, so it was urged, diluted the voting strength of blacks and Puerto Ricans. Judge Campbell held there was "no evidence" of this and denied the last minute attempt to file an amended complaint.

The Court of Appeals for the Seventh Circuit, on December 14, 1970, affirmed the judgment of Judge Campbell, but limited its affirmance to rejection of the claim that the wards of Chicago, under the new 1970 ordinance, did not sufficiently approximate equality of populations. In an unreported order (*Skolnick* v. *Mayor and City Council of Chicago,* 7 Cir., No. 18878), the court of appeals said:

> "We conclude that, considering the ordinance from the point of view of mathematical precision alone, the district court's decision that the ordinance fulfills the required standards (*Reynolds* v. *Sims,* 377 U.S. 533, and *Kirkpatrick* v. *Preister,* 394 U.S. 526), is to be affirmed."

But, with respect to the claims of racial and ethnic gerrymandering, the court of appeals expressly declared that

the claims had not been fully litigated and, consequently, there was nothing to prevent a new action concerning them from being filed.

The First Trial of This Case

Promptly, on December 22, 1970, the present plaintiffs filed such a suit. Because the general aldermanic election, scheduled for February 23, 1971, was then imminent, District Judge Joseph Sam Perry, to whom the new case was assigned, expedited the trial. Hearings began on December 29, 1970, and continued through January 18, 1971. Five of the plaintiffs—Cousins, Rayner, Despres, Singer and McCutcheon—were aldermen at the time the suit was filed. Cousins, Despres and Singer are still incumbents.

Because the evidence presented by the plaintiffs at the second trial was practically the same as their evidence at the first trial, with the exception of a draft ward map prepared by the plaintiffs and introduced at the second trial, and because the reason for the unique remand, under which the second trial was conducted, cannot be made clear without allusion to the evidence at the first trial, we shall here indicate the nature of that evidence. Indeed, the opinion of the court of appeals, from which certiorari is here sought, itself states that many of the pertinent facts are set out in its earlier opinion and "will not be repeated here" (503 F. 2d at 913; App. A1).

Plaintiffs' case, as originally conceived, was based upon the theory that, under the Constitution, the proportion of wards in which the majority of the population is of black or Puerto Rican identification must be the same as the proportion of the number of persons of such racial or ethnic identification is to the total population.

The court of appeals rejected this theory with the statement (466 F. 2d at 843):

> "There is no principle which requires a minority racial or ethnic group to have any particular voting strength reflected in the council. The principle is that such strength must not be purposely minimized on account of their race or ethnic origin."

Distribution of Blacks and Puerto Ricans Among the Wards of Chicago

According to the 1970 census figures available at the time of the oral argument of the first *Cousins* appeal in the court of appeals on March 16, 1971, the total 1970 population of Chicago was 3,367,000. Of this total 1,103,000 persons, or 32.7%, were black.

The opinion of the court of appeals (466 F. 2d at 834), found that, under the 1970 ordinance, in 15 of the 50 wards a majority of the residents are black. The population of blacks in each of the wards is set out at that point in the opinion of the court of appeals.

Plaintiffs contended that if the lines had been drawn with indifference to the color of the residents, there would have been more wards with a black majority.

Testimony at the trial also tended to show that there are about 80,000 residents of the city who are of Puerto Rican origin. Most of these people live in the 26th, 31st and 33rd wards. As the wards are drawn, Puerto Ricans are a very substantial minority in each of these three wards: 40-45% in the 26th, 30-35% in the 31st, and 25-30% in the 33rd. Plaintiffs claimed that if the wards had been drawn differently, Puerto Ricans might have had a majority in one or possibly two wards.

Testimony of the Opinion Witnesses

In support of their position the plaintiffs presented the testimony of three experts on demography and statistics. One of these witnesses was Dr. Philip Hauser, director of the Population Research Center at the University of Chicago, who had been acting national director of the 1950 census and chairman of the advisory committee for the 1960 and 1970 censuses. He stated that the 1970 ward lines were the progeny of the succession of ward maps of the last 40 years and even of times prior to that and that the character of the distribution of blacks among the wards was related to the dense concentration of blacks in certain areas of the city, areas sharply divided from bordering areas with only a small percentage of black residents. Hauser concluded that the number of wards crossing racial or ethnic dividing lines, in which blacks or Puerto Ricans are the minority, is "far above the level that probability expectations would indicate, or another way of saying that, it is perfectly clear to me that the ward lines on that map could not possibly have been drawn by anyone who was color blind."

The court of appeals did not find the statistical experts convincing. It declared (466 F. 2d at 840) that "a demonstration that the wards could, with the census figures at hand, have been drawn with similar equality of population, and no less compactness, but into more wards having a black or Puerto Rican majority, would be more persuasive than a mere opinion that if the wards had been drawn with indifference to race, a greater number of black or Puerto Rican majority wards would have been more probable."

However, the court of appeals found (466 F. 2d at 840, 841) more significance in the testimony with respect to the

history of racial distribution in Chicago and the configuration of prior reapportionment ordinances as tending to show "that as the black population of Chicago increased, the redistricting ordinances in 1931, 1947 and 1961 had changed ward boundaries in a manner corresponding to the growth of areas in which the residents were predominantly black, so as to keep at a high figure the number of wards in which a majority of residents were white." The court states (at 841) that such testimony should not be found meritless without careful scrutiny.

The Students' Map

During the first trial it was disclosed that shortly prior to the drafting of the 1970 reapportionment by the subcommittee, a group of three graduate political science students at the University of Illinois (Chicago campus), working under the direction of two faculty members, had drawn a tentative map of their own, using preliminary census figures. They had done this work in the library of the law office of the chairman of the subcommittee that prepared the draft of the 1970 ordinance. These quarters had been made available at the request of one of the faculty members, who was also an administrative assistant to the chairman.

Actually, as was set forth at length in the record, a great deal of patient, laborious mathematical research, by way of analysis of census tracts and enumeration districts and their realtion to both the geography and demography of the city, was required, so that the City Council would be in a position to know what viable choices were open to it in redistricting. That preliminary work was done, not by students, but by professionals, working under the direction of the Commissioner of Development and Planning.

But reapportionment at the time was a topic of intense interest to political science students, and the project was obviously appropriate academically. Furthermore, the drafting of the 1970 reapportionment was the first time the wards of Chicago had been districted in accordance with the rigors of the one-person, one-vote rule, as then recently directed by this Court in *Avery* v. *Midland County, Texas,* 390 U.S. 474 (1968). It was therefore no doubt of interest to the chairman of the subcommittee to see how the students worked out their project under the supervision of his administrative assistant, to note what problems they encountered, to gather an impression of how difficult it might be to fit the pieces of the puzzle together.

According to the students' testimony, the chairman, then Alderman Keane, dropped into the library occasionally while the students were at work, and made a few casual remarks about their efforts. He seemed particularly interested in facilitating his own re-election and that of two young proteges of his, Aldermen Burke and Sheridan. In his own ward (the 31st) there had been a marked increase in the Puerto Rican population in the east end of the ward and he suggested to the students that, in their draft, they move the eastern boundary of the 31st ward further west.

The chairman also expressed concern, according to the students, with keeping incumbent Burke in the 14th ward and incumbent Sheridan in the 16th. Both of these aldermen are white. Keane thought it might be difficult to reelect them because of the changing racial composition of those wards. But as the opinion of the court of appeals in the first appeal noted (466 F. 2d at 839), although these wards, as drawn by the students, would probably have been predominantly white, the 16th ward, as constituted

by the City Council, is 95.3% black. Sheridan did not attempt to run for re-election in the 16th, but moved to the 15th, which is 91.2% white, where he ran and was defeated. A black woman candidate was elected alderman in Sheridan's former ward, the 16th. Burke was re-elected in the 14th ward, which is 93.1% white.

Plaintiffs' petition for certiorari states (p. 4), "The court of appeals, in its first opinion, noted that the City's reapportionment plan had been based upon a reapportionment map drawn in secret by Thomas Keane, the alderman in charge of the City Council's reapportionment subcommittee. (466 F. 2d at 835)." Actually the opinion of the court of appeals described the students' map as "an earlier and confidential version of a proposed ward map [that] had been prepared . . . with Alderman Keane's knowledge and approval. . . [W]e consider . . . such preparation was at least a trial run for the process later conducted at public hearings."

In fact the students' trial run fell far short of achieving equality of populations, within permissible variances. Addition of the population figures, census tract by census tract, according to the preliminary census tract counts used by the students, reveals that the most populous ward on the students' map was their 17th, with 77,826 residents, and their least populous ward was their 45th, with 54,946 residents—a spread of 22,880—more than one-third of the students' target figure of 66,400. In contrast, on the official ward map adopted by the City Council, there is a spread of no more than 9/10ths of one percent between the most populous and the least populous ward.

Evidence Concerning the 7th Ward

Under the 1970 redistricting, the 7th Ward has 26.9% black residents, according to the 1970 census. This and the following facts are in accord with the findings of the court of appeals in the first appeal. 466 F. 2d at 838. The 7th Ward includes the area of Chicago known as the South Shore. It lies between Lake Michigan on the east and the 8th Ward on the west. The 8th Ward has 77.8% black residents and is represented by plaintiff Alderman Cousins, who is black.

The former 7th ward, under the 1961 ordinance, extended farther north and not so far south. At the time of the first trial, it was believed that, because of shifts of population, the old 7th ward had come to have a constituency between 55% and 60% black. (Final census figures, first available in 1972, showed that the proportion of blacks was 48.3%.) The 7th ward was represented by Alderman Bohling, who is white. According to William Taylor, one of the student internes, "Mr. Bell," (the administrative assistant to the chairman of the subcommittee) "wanted to be able to keep Alderman Bohling in the 7th Ward." And, as drawn on the students' map, the 7th Ward had 29.4% black residents.

The court of appeals found (466 F. 2d at 838) that at the subcommittee hearings, census tract 4603, with a population of 8,885, of which 93.3% were white, was at one stage included in the predominantly black 8th Ward, represented by plaintiff Alderman Cousins, who, as previously stated, is black. It was further found by the court of appeals that, during the proceedings, this white tract, 4603, was shifted into the 7th Ward, a change offset by the transfer of predominantly black tracts to the already predomi-

nantly black 8th Ward. Alderman Cousins testified at both trials that the chairman of the subcommittee remarked to him, "I understand they have a lot of Polish voters over here, and you don't want to represent them." Keane testified he did not recall making that statement. In any event, there is no evidence in the record that Cousins repudiated the alleged transfer of Polish voters out of his ward—which, according to his attorney's argument, would be invidious diminution of the voting strength of an ethnic group. The Fourteenth Amendment protects all persons, including whites.

The court of appeals concluded (466 F. 2d at 838):

> "It must be said that putting Tract 4603 into the 7th Ward tended to make that ward more compact. If the statement was made, however, it indicated at least *awareness of the racial composition of the area being transferred, although we do not suggest that proof of awareness alone would establish invidious discrimination.*" (Emphasis supplied.)

The First Opinion of the Court of Appeals

On May 25, 1972, the court of appeals filed its 2-to-1 opinion, reversing the judgment of Judge Perry and remanding for a new trial "consistent with this opinion." Judge Stevens dissented.

The majority opinion, written by Judge Fairchild, and concurred in by Judge Cummings, attached importance to the student internes' testimony that the racial and ethnic composition of several wards—the 7th, the 14th, the 16th and 31st—had been mentioned either by the chairman or his administrative assistant. The court also considered it significant that the chairman, in his deposition, received in evidence, had failed to mention the draft trial map

drawn by the students in his own office. The majority concluded (466 F. 2d at 843):

> "Plaintiffs did not produce other persuasive circumstantial proof that the ward boundaries were the product of purposeful discrimination. . .
>
> "[W]e are unable to say that plaintiffs' evidence so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court so to find. If the litigation concerned ordinary interests of the plaintiffs alone, we might well conclude that they must bear the burden of failure to establish more clearly all the elements of their case. We are of the opinion, however, that the type of rights involved here requires special care that claims of impairment be thoroughly inquired into.
>
> "We conclude . . . that the proper and just result is a new trial of the issues."

An extensive dissenting opinion was filed by Circuit Judge Stevens. He observed that since district boundaries are drawn by the legislative process, they will inevitably reflect group interests. He deemed improper an inquiry into the motives of individual legislators, such as the majority opinion embarked upon, and which, by its remand, it directed to be more fully pursued in the trial court. Judge Stevens repudiated this approach, terming it a view consistently rejected by the Supreme Court since 1810. Judge Stevens remarked (466 F. 2d at 856, 857):

> "[I]t demeans the legislative process to inquire into private conversations between aldermen or to draw an invidious inference from the facts that members of the Council are 'acutely aware' of the racial composition of changing areas of the city. Of course they are. Responsible legislators are expected by their constituents, black and white, rich and poor, to be informed about such matters."

plaintiffs' case at the first trial, were, however, rendered unnecessary at the second trial by the supervening availability of the final, official 1970 U. S. Census figures on the number of blacks and Spanish-speaking ethnics in Chicago, census tract by census tract, statistics that were not published until 1972.

Plaintiffs' Demonstration Map

The only improvement in the plaintiffs' case was their production of their own draft ward map of Chicago (Plaintiffs' Exhibit DD), allegedly drawn without thought of race and with attention directed solely to numerical equality of the wards and compactness. The map was drawn by Rubin Singer, a board member of plaintiff Independent Voters of Illinois, with the help of several non-professional volunteers. This was the only attempt by the plaintiffs to comply with the suggestion of the court of appeals (466 F. 2d at 843) that one or more maps be drawn, on the theory that they might be "persuasive circumstantial proof . . . of purposeful discrimination."

Plaintiffs' map contained 16 wards with a black majority—only one more ward with a black majority than the 15 wards with a majority established by the official 1970 reapportionment. The Singer map failed to draw a single ward with a Puerto Rican majority.

The area of the 7th Ward was designated on the Singer map as Ward F, and this contained a black minority of about 21%, whereas the actual 7th ward under the 1970 ordinance is 26.9% black.

The Students' Map at the Second Trial

The testimony by the students at the second trial added nothing not mentioned at the first trial that in any way

indicated that any invidious racial or ethnic discrimination had entered into the official 1970 reapportionment. William Taylor, the student witness on whom the plaintiffs principally relied, testified that during the fortnight the students were working on the map, the subject of the "racial or ethnic makeup of the neighborhoods" "came up" "maybe 30 or 40 times." But there is not the slightest indication in the record of the substance or even the tone of these remarks. For all that appears in the record to the contrary, the discussion may have been marked by pronounced solicitude for civil rights.

Alderman Keane, chairman of the subcommittee, testified and categorically denied that he had used the students' map in his own work on the preparation of a ward map for the Council's consideration. He stated that it would have been utterly beyond his mental powers, or those of anyone else, to have memorized the outline of the ward boundaries on the students' map, census tract by census tract, and to have then employed them, at public hearings held across the street, in the drafting of the official map then in process of becoming, devoid as it was of guidelines.

The plaintiffs made no attempt to rebut this testimony of Keane by demonstrating that the ward boundaries on the students' map could be memorized. In fact, it was admitted by the plaintiffs that the census tract map of Chicago, which Keane used in calling out census tracts at the subcommittee hearings, was without guidelines. Plaintiff Alderman Despres, who testified he attended, as did plaintiff Alderman Cousins, almost every subcommittee hearing, said he made a point of sitting up close, at Keane's elbow, where he kept an eye on Keane throughout the proceedings. Despres stated he examined the developing draft of

the official map, while it was being drawn, for tell-tale lines or marks, but admitted he found none. Despres even testified that he saw another observer examine the map with a microscope, with no different result.

The Second Judgment of the District Court

On July 19, 1973, Judge McMillen entered judgment at the conclusion of the second trial. He held that such political considerations as may have influenced the redistricting were non-justiciable political questions. The court further found that no purposeful, invidious diminution of the voting strength of any racial or ethnic group had been proven —except in the 7th ward.

To correct the racial gerrymandering it concluded had occurred in the 7th ward, the district court ordered an exchange of approximately half the populations of the 7th and 8th wards, resulting in the creation of two new wards, each with a 52% black majority. A special election was ordered and held in the 7th ward, but not in the 8th. The white incumbent in the 7th ward did not run in this special election, and a new alderman, a black, was elected and took office.

The Second Opinion of the Court of Appeals

The plaintiffs appealed the general judgment that no racial gerrymandering had occurred in 49 of the 50 wards of the city. The City Council and Mayor cross-appealed the findings and orders with respect to the 7th and 8th wards.

The second appeal was heard and decided by the same panel of judges that sat on the first appeal. But this time

they were unanimous, and they ruled in favor of the City Council and the Mayor on all issues.

On the authority of this Court's opinions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), *White* v. *Regester*, 412 U.S. 755 (1973), *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967), and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), the court of appeals rejected the plaintiffs' contention that in cases of alleged racial gerrymandering, the legislative enactment is to be deemed "inherently suspect," and that, in consequence, the burden of proof must be shifted to the defendants to justify the legislation. The court of appeals held that the usual rule, that legislation is presumed to be constitutional, is applicable to cases of alleged racial gerrymandering. Therefore, the burden is on those attacking the enactment to prove it invalid, not by a mere preponderance of the evidence, but by "clear and convincing evidence" to a moral certainty. This burden of proof the court found the plaintiffs had not met by presenting proof of prior, historic discrimination.

As to the 7th ward, the court of appeals concluded that the transcript of the subcommittee proceedings showed that the 1970 changes in its boundaries had been occasioned by prior changes in the 9th and 10th wards, effected so as to make the 9th ward more compact—a fact overlooked by the district court. A detailed analysis of the complex situation is set forth in the opinion of the court of appeals (503 F. 2d at 916-919).

The 9th ward on the 1961 map had been L-shaped and occupied the south-east corner of the city. The main portion of ward 9 extended north from the southern city limits and was situated west of ward 10. The appendage extended eastward to the Indiana state line and lay south

of the 10th ward. Student interne Taylor testified that on the student map the eastern appendage of the 9th ward was eliminated and the new 10th ward occupied the southeast corner of the city. The same change was made on the official map, resulting in greater compactness.

The drafting of the official map of the 7th ward went through three revisions, in which various census tracts were moved back and forth and in and out of the 7th ward in order to achieve close approximation to the target of equality of population with the other wards. The court of appeals found that these changes resulted in a reduction of about 2.5% in a black minority of approximately 30% and were insignificant as related to the issues of this case.

The contention that the 14th and 16th wards had been racially gerrymandered was also disallowed. The court found that the territory encompassed by the 14th, 15th and 16th wards could not, because of its clearly delineated racial makeup, be divided, as plaintiffs claimed, into three compact wards, two of which would be majority black.

Likewise, the 31st ward was found not to have been gerrymandered to the disadvantage of Puerto Rican voters. The transfer of some Puerto Ricans in the eastern end of the 31st ward to the 26th ward had resulted in increasing their strength in the 26th ward, where they constitute a sizeable minority. The court of appeals concluded that, under the 1970 ordinance, the 31st ward has a Puerto Rican population of about 25% and that, if the census tracts in question had been retained in the 31st, at most there would have been no more than a 32% Puerto Rican minority in that ward.

The Puerto Rican population of Chicago is so distributed, the court of appeals found (466 F.2d at 921),

that it is at present impossible to create a single ward with a Puerto Rican majority.

In addition, the court ruled that the wards as districted by the 1970 reapportionment were sufficiently compact to satisfy state law, which is controlling in the matter of compactness.

However, the court limited its reversal of the district court's invalidation of the 7th ward boundaries so as to permit the present incumbent to finish out his term, which will be concluded in April, 1975.

On October 21, 1974, the court of appeals denied plaintiffs' petition for a rehearing *en banc* before the entire court.

REASONS FOR DENYING THE WRIT

If by "the issues presented" is meant the principles invoked by the petitioners—claims of impairment of voting rights on the basis of race and ethnic origin—then the issues presented unquestionably are of "central importance," as the Petition for Certiorari claims (p. 6). But if the phrase "the issues presented" is meant to include, as it should, the actual matrix of facts and alleged facts within which petitioners are attempting to develop an application of those constitutional principles, then without doubt this is by no means a case of "central importance."

In any event, whether or not this case is of "central importance," the relevant constitutional principles have already been thoroughly clarified by the decisions of this Court. Though the concurring opinion of Judge Stevens in the court of appeals (503 F.2d at 925) does speak of this as "an area of the law which is largely undeveloped," he did not find the result reached insufficiently buttressed by the Supreme Court precedents referred to in the opinion of the court of appeals, which Judge Stevens characterized (*id.*) as "Judge Fairchild's meticulously accurate opinion."

That opinion was the result of two extensive trials and two extensively briefed appeals, in all of which the controversy was subjected to very strict, very detailed judicial scrutiny.

I.

NO BLACKS OR PUERTO RICANS HAVE BEEN "PURPOSEFULLY EXCLUDED" FROM THEIR VOTING RIGHTS BY THE PRESENT CHICAGO REAPPORTIONMENT ORDINANCE.

THE COMPOSITION OF THE CITY COUNCIL OF CHICAGO, COUPLED WITH THE CENSUS FIGURES, DEMONSTRATES THAT THERE HAS BEEN NO INVIDIOUS DISCRIMINATION IN THIS RESPECT.

Throughout their petition for certiorari (pp. 2, 4, 5, 6, 7, 9, 10, 14) plaintiffs discourse on blacks and Puerto Ricans "being purposefully excluded" in the Chicago reapportionment as though blacks and Puerto Ricans had been intentionally excluded from voting in Chicago.

Nothing of that sort has happened. The blacks and Puerto Ricans of Chicago are not situated in anything resembling the lot of the blacks of Tuskegee, Alabama, who were at one time debarred from having any voice whatsoever in their municipal affairs by the device of redrawing the boundaries of the city so as to place blacks outside the city limits. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

Petitioners' quotation (Petition, p. 14) of *Carrington* v. *Rash*, 380 U.S. 89, at 94 (1965), that "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," is not only wholly inapposite, but misleading. The Texas statute there involved barred all members of the armed forces ordered into Texas from voting in state elections, no matter how long they resided in that state. The instant case, on the contrary, has nothing whatsoever to do with barring anyone from voting.

The persons whom petitioners profess to be concerned about were simply transferred from one municipal legislative district to another. They continued to have the right to vote in all municipal, county, state and federal elections. There has been no restriction on their becoming candidates for public office. It should also be noted that the redistricting here under scrutiny is relevant only to the election of aldermen. In all other elections, it makes not a particle of difference in which ward of Chicago the voter resides.

It should be again noted that the wards of Chicago, under the present districting, have been found both by the district court and the court of appeals to be equal in population within a maximum variance of 0.9%. *Skolnick* v. *Mayor and City Council of Chicago*, 319 F. Supp. 1219 (N.D., Ill., 1970), aff'd, 7 Cir., No. 18878 (1970) (unreported); cert. den. 397 U.S. 954 (1970). Therefore, the transfers in question in no way impaired or diminished the right of any individual to vote.

Furthermore, the alleged diminution in voting strength claimed by the petitioners relates to the aggregate strength of the racial or ethnic group, if it should choose to act as a group and presumably vote for a candidate of its own racial or ethnic identification.

But the decisions of this Court have certainly made it clear that "there is no right to have proportional representation of races, creeds or colors in the legislative so long as there is an equal opportunity for all to register and vote in districts of substantial population equality." *Kilgarlin* v. *Martin*, 252 F. Supp. 404 (S.D. Tex. 1966; expressly aff'd as to the issue of racial gerrymandering, sub. nom. *Kilgarlin* v. *Hill*, 386 U.S. 120, at 121 (1967).

In *Kilgarlin*, the three-judge district court noted (at 437) that the plaintiffs' witnesses argued in terms of the "voting strength of racial elements . . . not as a right of equality in the weight of votes, but as a right to be represented by a person of one's own race," and the court characterized this as "an erroneous legal premise." In support of this ruling, the court cited *Reynolds* v. *Sims*, 377 U.S. 533, at 537 (1964), and *Mann* v. *Davis*, 245 F. Supp. 241 (ED, Va. 1965); aff'd sub. nom. *Thornton* v. *Davis*, 382 U.S. 42 (1965). It also quoted with approval from Mr. Justice Douglas' dissenting opinion in *Wright* v. *Rockefeller*, 376 U.S. 52, at 66, 67 (1964), where he said:

> "Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines."

And the three-judge district court concluded with the following quotation from *Mann* v. *Davis*, 245 F. Supp. at 245:

> "The concept of 'one person, one vote,' we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color."

Nevertheless, even if proportional representation were required or permitted under the law, which it is not, even then the present districting of the wards of Chicago would pass muster. According to the 1970 U.S. census, which Illinois law mandates must be used as the basis of reapportionment, blacks constitute 32.7% of the population of Chicago. At the time of the last trial, 15 of the 50 wards had black majority populations and 14 of the 50 aldermen were black. That is, 30% of the wards had populations

gave them an opportunity to develop additional statistical evidence on this issue [substantial diminution in black voting strength], *plaintiffs did not satisfy their burden of proof.*" 503 F.2d at 920; Petition, p. A16. (Emphasis supplied.)

Petitioners contend that the rule adopted by the lower courts herein, requiring the plaintiffs in a racial gerrymandering case to prove intentional diminution of their voting strength because of race or ethnic origin "means that few if any victims of racial gerrymandering will ever be able to prove their case" (Petition, p. 7). The answer to that is to be found in the opinion of the court of appeals, which explains (503 F.2d at 914, fn. 1; Petition, p. A3):

> "Purposeful minimization of the voting strength of a minority racial or ethnic group is the sort of conduct proof of which is unlikely to be direct or specific. A finding that the challenged districting reflects such discrimination must usually rest on inference from circumstances. One approach, where such a claim is made, is to compare the number of black majority wards in the challenged map with another map which might equally reasonably be drawn, but with more such wards, and assess whether the difference is more probably explained by a purpose to discriminate than by legitimate considerations."

The plaintiffs attempted to comply with that suggestion. They presented a draft ward map of their own, known as the Singer map, after its principal draftsman, Rubin Singer, a board member of plaintiff Independent Voters of Illinois. According to a table set out in the margin of the opinion of the court of appeals (503 F.2d at 915; Petition, pp. A4, 5), the Singer map outlines 16 wards out of 50 with a majority black population, as compared with 15 on the official map, and 19 wards with 35% or more black

population, as compared with 18 wards with 35% or more black population on the official map. The Singer map failed to create a single ward with a population in which Puerto Ricans were in the majority. The court of appeals found the Singer map insufficiently persuasive to cause it to declare that the decision of the district court that 49 of the 50 were not racially gerrymandered was clearly erroneous (503 F.2d at 915; Petition, p. A5). But the court of appeals also found, with respect to the 7th ward, the one ward the district court found to be racially gerrymandered, "the failure of the Singer map to produce more black majority or substantial minority wards in the southeastern part of the city" an aid in reaching its conclusion reversing the district court as to the 7th ward.

Since the petitioners failed to make out a prima facie case of invidious discrimination, there was no occasion to shift the burden of proof and to require the City to justify the 1970 reapportionment ordinance pursuant to the "strict scrutiny" test, or any other test.

III.

THE "STRICT SCRUTINY" DOCTRINE IS NOT APPLICABLE TO LEGISLATIVE DISTRICTING CASES INVOLVING CLAIMS OF RACIAL GERRYMANDERING.

This question is academic, since the petitioners did not prove a prima facie case of invidious discrimination, and therefore the point was not reached where a determination of which test of justification of the ordinance would be called for.

Petitioners candidly admit (Petition, p. 10) that "the court of appeals correctly noted that there are no decisions of this Court 'involving either multi-member or

single-member districting' in which 'strict scrutiny' analysis, as defined in *San Antonio* [*School District*] v. *Rodriguez*, 411 U.S. 1 (1973), has been applied." (503 F.2d at 208; App. A207) and that "[t]he court of appeals therefore concluded that the 'strict scrutiny' analysis should not apply."

It appears to be the position of petitioners that the court of appeals thereby erred because "this Court's prior gerrymandering decisions do not resolve, or even squarely consider the question." Evidently petitioners do not regard the actual practice of this Court in racial gerrymandering cases as of any moment.

The precedent most similar to the case at bar appears to be *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). That involved an attack on the apportionment of the multi-member Marion County (Indianapolis), Indiana, state legislative district, on the ground that it illegally minimized and cancelled out the voting power of the cognizable black racial minority in the ghetto, as evidenced by fewer legislators having resided in the ghetto than would have been proportionate to the ghetto's percentage of the county's population. Concerning the burden of proof in the establishment of such a claim, this Court could not have spoken more clearly. It said (at 143):

> "But *we have insisted that the challengers carry the burden of proving* that multi-member districts unconstitutionally operate to *dilute or cancel the voting strength of racial or political elements.*" (Emphasis supplied.)

This is very far from the theory urged by petitioners that once it has been shown that, in drafting a reapportionment, the legislators transferred certain voters from

> one district to another while knowing that those voters were of a certain racial or ethnic identification, then at that point the burden of proof shifts to the legislature to justify the ordinance under the "strict scrutiny" test, which properly means that the legislation must then be shown to be necessary to the realization of a compelling state interest, and that no less discriminatory means can be found that will encompass that compelling goal. *Whitcomb* v. *Chavis* is dispositive of that illusion.

Nor can the basic theory of petitioners withstand examination in the light of *Wright* v. *Rockefeller*, 386 U.S. 52 (1964). There it was charged that the New York congressional apportionment statute deprived non-white voters and citizens of Puerto Rican origin of rights guaranteed by the 14th and 15th Amendments, by concentrating them in one of four Congressional districts of Manhattan, which the plaintiffs termed (at 54) "Ghettoizing the Island of Manhattan," since, so it was contended, it was impossible to have districts such as these unless they "were drawn with regard to race." The evidence showed that the proportions the Negro and Puerto Rican populations of the district bore to the total populations of the respective districts were 86.3%, 28.5%, 27.5% and 5.1%. A dismissal of the action was affirmed by this Court on the ground (at 55, 56) that, although the plaintiffs had introduced evidence which might justify an inference that racial considerations motivated the apportionment, other inferences were equally or more justifiable, particularly the concentration of black and Puerto Rican voters in certain areas, which "made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of voters among the districts" (at 57). As the late Justice Black stated in writing for the Court (at 55, 56):

> "Plaintiffs have a difficult burden to meet in attacking the constitutionality of the state statute."

Only a few weeks ago this Court again reaffirmed this principle. In *Chapman* v. *Meier,* ..... U.S. ....., 43 LW 4199 (Jan. 27, 1975), in reversing a district court ordered reapportionment of the North Dakota Legislative Assembly, the unanimous opinion of this Court, written by Mr. Justice Blackman, stated (43 LW at 4204):

> "[T]here must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political processes equal to the access of other groups. *White* v. *Regester,* . . . 412 U.S. at 765-766."

In the case at bar the court of appeals was correct in concluding (503 F.2d at 922, 923; Petition, p. A20) that although fundamental constitutional concerns about voting and racial discrimination are intertwined in racial gerrymandering cases, "plaintiffs have not cited nor are we aware of any such action, involving either multi-member or single-member districting, in which the 'strict scrutiny' analysis, as defined in *San Antonio,* has been applied."

The petition for certiorari in no way remedies this lack of authority for this basic contention of the plaintiffs. None of their citations are reapportionment cases.

Petitioners invoke (Petition, pp. 13, 14) *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), in which this Court invalidated a Tennessee election statute requiring a residence in the State of at least one year as a precondition of voting. But there the plaintiff was deprived of the right to vote; he could not vote at all. Although he was a bona-fide resident he was stripped of "a fundamental political right . . .

preservative of all rights." This Court held (at 342, 343) that such a clear deprivation of constitutional rights must be measured by "a strict equal protection test" and such laws are unconstitutional unless the State can demonstrate that the enactment is "necessary to promote a compelling governmental interest."

The blacks and Puerto Ricans of Chicago have not been deprived of the right to vote. They are freely allowed to exercise their constitutionally protected right to participants in aldermanic elections in Chicago on an equal basis with all other citizens of the city.

Jones v. *Georgia,* 389 U.S. 24 (1967), cited in the petition (p. 15), was not concerned with the constitutionality of legislation, which, as the court of appeals ruled (503 F.2d at 924; Petition, p. A23), carries a presumption of constitutionality, even when it is a reapportionment enactment "challenged on the ground of racial gerrymandering," a presumption that can be overcome not by a mere preponderance of the evidence, but only by "clear and convincing" evidence, i.e., to a moral certainty. *Jones* was a murder case in which the defendant, a black, claimed he had been denied equal protection through the systematic practice of excluding blacks from juries in the county.

Turner v. *Fouche,* 396 U.S. 346 (1970), cited in the petition (p. 15), also related to a practice resulting in the disqualification of a high disproportion of blacks from jury service.

Neither was *Keyes* v. *School District, No. 1, Denver, Colorado,* 413 U.S. 189, cited in the petition (p. 15), related to the constitutionality of legislation. *Keyes* was an injunction proceeding brought with the aim of desegregating the schools of Denver. It was not disputed that the

school board had followed an impermissible policy in one district, and on account of that fact this Court remanded the case for further trial.

The petitioners' conception of the "strict scrutiny" test is unduly simplistic and mechanical. They would do well to study Mr. Justice Marshall's analysis of the nuanced "spectrum of standards [applied] in reviewing discrimination allegedly violative of the Equal Protection Clause" in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, at 98, 99, 36 L.ed. 2d 16, at 81 (1973).

In any event, the aldermen who drafted and enacted the Chicago reapportionment ordinance were obviously concerned with being re-elected. The court of appeals recognized in the first appeal of this case (466 F.2d at 844, 845) that such partisan political gerrymandering is non-justiciable, and reaffirmed that principle in the second appeal (503 F.2d at 917; Petition, p. A9). In support of this holding the court of appeals cited this Court's "affirmance of a decision that political gerrymandering does not raise questions under the Federal Constitution." *WMCA* v. *Lomenzo*, 238 F. Supp. 916, at 925 (SD, NY, 1965), aff'd per curiam, 382 U.S. 4 (1965). It also noted several three-judge district court decisions holding political gerrymandering non-justiciable: *Sims* v. *Baggett*, 247 F. Supp. 96, at 104 (MD, Ala. 1965); *Sincock* v. *Gately*, 262 F. Supp. 739, at 833 (DC, Del. 1967); *Meeks* v. *Avery*, 251 F. Supp. 245, at 250 (DC, Kan. 1966); *Bush* v. *Martin*, 251 F. Supp. 484, at 510, 513 (SD, Tex. 1966); and, in particular, *Wells* v. *Rockefeller*, 311 F. Supp. 48, at 54 (SD, NY, 1970), aff'd 398 U.S. 901 (1970).

Of more recent vintage than those familiar citations is this Court's decision in *Gaffney* v. *Cummings*, 412 U.S. 735

(1973), which upheld the constitutionality of a "political fairness" principle consciously and overtly used in reapportioning the Connecticut General Assembly. This policy "aimed at a rough scheme of proportional representation of the two major political parties. Senate and House districts were structured so that the composition of both Houses would reflect 'as clearly as possible . . . the actual [statewide] plurality of vote on the House or Senate line in a given election.' Rather than focus on party membership in the respective districts, the Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats." (412 U.S. at 738, 37 L.ed. 2d at 303). This Court held that that was not invidiously discriminatory. The opinion of the Court, written by Mr. Justice White, concluded (412 U.S. at 754, 27 L.ed. 2d at 313):

> "[W]e have not . . . attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."

IV.

THE ISSUE OF THE CORRECTNESS OF THE COURT OF APPEALS' REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT AS TO THE 7th WARD HAS BEEN WAIVED.

Petitioners include among their Questions Presented the issue of whether the court of appeals erred in reversing the district court's finding that the 7th ward had been racially gerrymandered. (Petition, p. 3.) However, petitioners have failed to argue the point.

As a result, we have nothing to which to respond on the issue of the 7th ward and review of the court of appeals' reversal of the district court's judgment as to the 7th ward has, we submit, been waived.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, or, in the alternative, the writ should be granted and the judgment of the court of appeals summarily affirmed.

Respectfully submitted,

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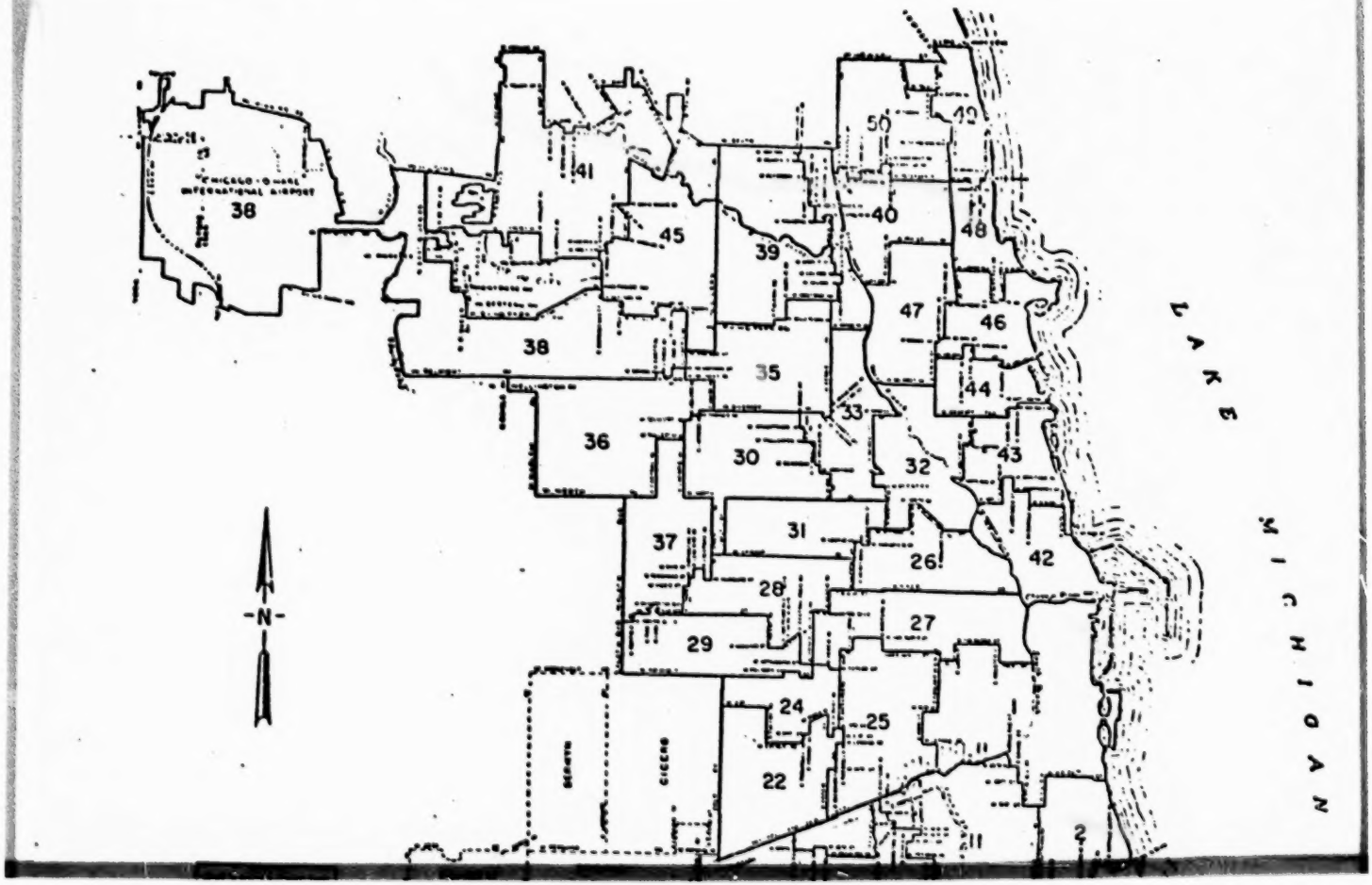
February 28, 1975.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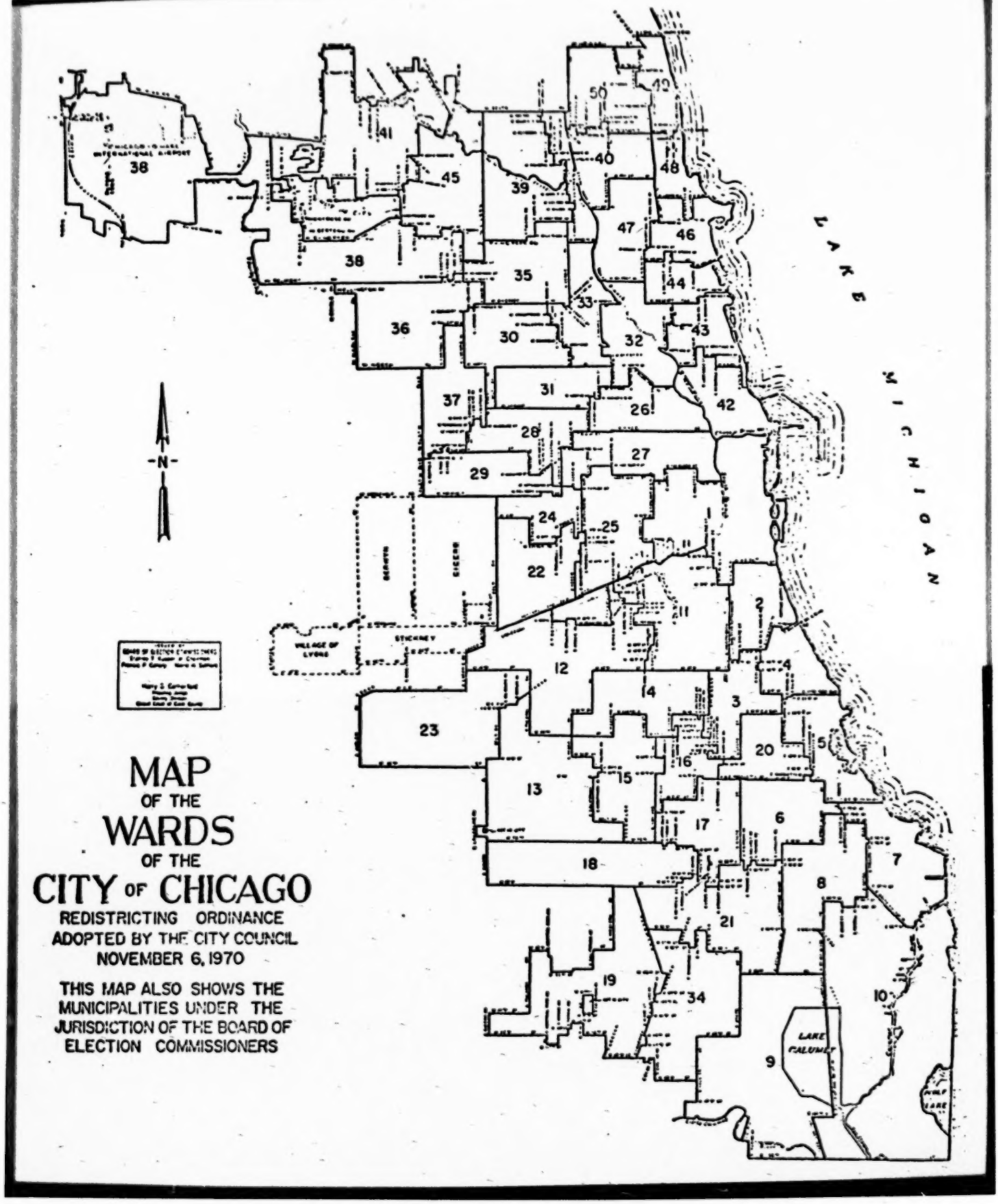

MAP
OF THE
WARDS
OF THE
CITY OF CHICAGO

REDISTRICTING ORDINANCE
ADOPTED BY THE CITY COUNCIL
NOVEMBER 6, 1970

THIS MAP ALSO SHOWS THE
MUNICIPALITIES UNDER THE
JURISDICTION OF THE BOARD OF
ELECTION COMMISSIONERS

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

Petitioners,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF CITING NEW AUTHORITY PURSUANT TO SUPREME COURT RULE 24(5)

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INDEX

PAGE

Introduction 1

The Fifth Circuit Has Adopted The Strict Scrutiny Test In Gerrymandering Cases—Thus Creating A Conflict Among The Circuits 1

Conclusion 4

CITATIONS

Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed. 2d 274, 92 S.Ct. 995 (1972) 2

Reese v. Dallas County, Alabama, 505 F.2d 879 (5th Cir. 1974) ..... *passim*

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PETITIONERS' SUPPLEMENTAL BRIEF CITING NEW AUTHORITY PURSUANT TO SUPREME COURT RULE 24(5)

INTRODUCTION

Petitioners respectfully file this supplemental brief pursuant to Supreme Court Rule 24(5) to draw to the Court's attention a new decision of the Fifth Circuit that is in direct conflict with the decision of the Seventh Circuit in the present case. That conflict is an additional reason for granting a writ of certiorari to review the decision of the Seventh Circuit.

THE FIFTH CIRCUIT HAS ADOPTED THE STRICT SCRUTINY TEST IN GERRYMANDERING CASES—THUS CREATING A CONFLICT AMONG THE CIRCUITS.

After petitioners had filed their Petition for Certiorari in this case, the decision of the Fifth Circuit in *Reese* v. *Dallas County, Alabama*, 505 F. 2d 879 (1974), became available. That decision holds—contrary to the decision of the Seventh Circuit in the present case—that the "strict scrutiny" test of *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), applies to gerrymandering litigation and renders unconstitutional a plan that discriminates against urban voters. In the present case both the district court and the Seventh Circuit rejected the strict scrutiny test even though both courts found that Blacks and Puerto Ricans had been purposefully excluded in drawing certain ward boundaries.

In *Reese* the Fifth Circuit, sitting *en banc*, reviewed the constitutionality of a scheme which provided for at-large election of county commissioners, but which required three of the four commissioners to reside in rural portions of the county. (505 F. 2d at 882)

In ruling the plan unconstitutional the Fifth Circuit held that a strict scrutiny test was to be applied and that such a test required a compelling state interest to sustain the plan:

> "*The standard of review by which justifications of the plan are to be judged is not entirely clear.* See Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny. 1973 Sup. Ct. Rev. 1, 29-32. Compare Kramer v. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969), with McDonald v. Board of Election Com'rs of Chicago, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). *The most recent articulation of the standards of review under the Equal Protection Clause appears in Dunn v. Blumstein, 405 U.S. 330, 335, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274 (1972):*

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

The Court concluded that statutes burdening the right to vote 'must meet close constitutional scrutiny' and be 'necessary to promote a compelling state interest.' Id. at 336-337, 92 S. Ct. at 1000. See Kramer v. Union Free School District, supra; Bullock v. Carter, 405 U.S. 134, 143, 92 S. Ct. 849, 855-856, 31 L. Ed. 2d 92.

> "This standard has been applied irrespective of any political or racial implications in the one man-one vote cases concerning congressional districts. Disparities in the weight accorded the votes of residents of different places has been sufficient to trigger strict scrutiny, even though location is not a suspect classification. See, e.g., Ellis v. Mayor and City Council of Baltimore, 4 Cir., 1965, 352 F. 2d 123, 129. Here the presence of political discrimination, which the Supreme Court has suggested is a suspect classification, underscores the propriety of a strict standard of review." (505 F. 2d at 886-87) (footnote omitted) (emphasis added).

In the present case the Seventh Circuit explicitly considered and rejected application of a strict scrutiny approach. See 503 F. 2d at 922-24, reproduced in Appendix A to the Petition for Certiorari, pp. A19-23, and discussed at pages 10-13 of the Petition for Certiorari.

There is, of course, no viable basis for distinguishing *Reese* from the present case. The fact that *Reese* did not involve racial discrimination makes it a *less* compelling case than the present case for applying the strict scrutiny test. The principle that prohibits discrimination against urban voters in *Reese*, unlike the prohibition against racial

discrimination that applies to this case, does not rest directly upon a constitutional mandate. The present case is stronger than *Reese* since it rests upon the explicit directives of the 14th and 15th Amendments.

Nor can *Reese* be distinguished by urging that petitioners in the present case have not established a prima facie case of discrimination. As is pointed out in our Petition for Certiorari, pp. 7-10, both the district court and the Seventh Circuit found in this case that ward boundaries had been drawn so as to purposefully exclude Blacks and Puerto Ricans from particular wards. If that does not establish a prima facie case it is hard to imagine what would.

In short the *en banc* decision of the Fifth Circuit in *Reese* is directly in conflict with the decision of the Seventh Circuit in the present case. That conflict is an additional reason for granting certiorari. Supreme Court Rule 19(1)(b).

CONCLUSION

The reasons originally set forth in our Petition for Certiorari warrant granting review in this case. The respondents' discussion of the case in their brief in opposition, while highly distorted and erroneous in many respects[1], does not effectively dispute the basic conclusion asserted in the Petition: that this case presents a constitutional issue of general importance that is not resolved by

[1] One of respondents' statements is so clearly wrong that we feel compelled to correct it. Contrary to their unsupported assertions (Brief in Opposition, pp. 26-28), petitioners have never urged, and do not now urge, any theory of "proportional representation" (Brief in Opposition, p. 26) or "remedial counter-discrimination" (p. 28).

existing Supreme Court authority. (See Brief in Opposition, pp. 32-33.)

The conflicting decision of the Fifth Circuit in *Reese* is additional support for the conclusion that the Seventh Circuit erred in the present case. This Court is respectfully urged to grant the Petition for Certiorari and clarify the law in this important area.

Respectfully submitted,

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[1] (Continued)

We do, however, agree with respondents' admission that the persons "petitioners profess to be concerned about were simply transferred from one municipal legislative district to another." (p. 26)

We would note that since such "transferring" was done because the persons were Black or Puerto Rican the 14th and 15th Amendments were violated.